

OLL 84-2793
6 August 1984

MEMORANDUM FOR: C/PMS/OL
C/L&PLD/OGC

STAT FROM:
Legislation Division
Office of Legislative Liaison

SUBJECT: Competition in Contracting Act

Attached for your information is the relevant portion of the Spending Reduction Act of 1984 containing the Competition in Contracting Act (S.338/H.R. 2545). Also attached is the relevant portion of the conference report. As you know, the President signed this bill into law on 18 July 1984 (Pub.L. 98-369).

STAT

STAT cc:

Attachment

Distribution:

Original - Addressee

1 - C/L&PLD/OGC

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1 - LEG Subject (Procurement)

1 - ROD Signer

OLL:LEG:ROD:sm (6 August 1984)

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apply with respect to articles containing distilled spirits brought into the United States from Puerto Rico after February 29, 1984, and before January 1, 1985.

(B) **\$130,000,000 LIMITATION.**—In the case of such articles brought into the United States after February 29, 1984, and before July 1, 1985, the aggregate amount payable to Puerto Rico by reason of subparagraph (A) shall not exceed the excess of—

(i) \$130,000,000, over

(ii) the aggregate amount payable to Puerto Rico under section 7652(a) of the Internal Revenue Code of 1954 with respect to such articles which were brought into the United States after June 30, 1963, and before March 1, 1984.

(C) **\$75,000,000 LIMITATION.**—In the case of such articles brought into the United States after June 30, 1984, and before January 1, 1985, the aggregate amount payable to Puerto Rico by reason of subparagraph (A) shall not exceed \$75,000,000.

(3) **LIMITATION ON PAYMENTS OTHER THAN TRANSPORTATION COSTS TO UNITED STATES DISTILLERS AFTER JUNE 30, 1984, AND BEFORE JANUARY 1, 1985.**—

(A) **IN GENERAL.**—Incentive payments paid after June 30, 1984, and before January 1, 1985, to each United States distiller with respect to articles containing distilled spirits which fail to satisfy the requirements of section 7652(c) of the Internal Revenue Code of 1954, as added by this section, may not exceed \$1,500,000.

(B) **PAYMENTS IN EXCESS OF LIMITATION.**—If any United States distiller receives, with respect to such articles brought into the United States—

(i) any incentive payment in excess of \$1,500,000, or

(ii) any other payment (other than for transportation costs),

such distiller shall pay to the United States the total amount of all incentive payments and other payments (other than for transportation costs) received after June 30, 1984, and before January 1, 1985.

(C) **INCENTIVE PAYMENT.**—For purposes of this paragraph, the term "incentive payment" means any payment, in a form and manner determined as of March 1, 1984 (other than a payment for transportation costs) made directly or indirectly by Puerto Rico to any United States distiller as an incentive to engage in redistillation operations.

(D) **TRANSPORTATION COSTS.**—For purposes of this paragraph, the term "transportation costs" means direct costs of transportation to and from Puerto Rico with respect to any article containing distilled spirits.

SEC. 2682. LIMITATIONS ON TRANSFERS OF EXCISE TAX REVENUES TO PUERTO RICO AND THE VIRGIN ISLANDS.

(a) **IN GENERAL.**—Section 7652 of the Internal Revenue Code of 1954 (relating to shipments to the United States) is amended by adding at the end thereof the following new subsection:

"(f) **LIMITATION ON COVER OVER OF TAX ON DISTILLED SPIRITS.**—For purposes of this section, with respect to taxes imposed under section 5001 of this section on distilled spirits, the amount covered into the treasuries of Puerto Rico and the Virgin Islands shall not exceed the lesser of the rate of—

"(1) \$10.50, or

"(2) the tax imposed under section 5001(a)(1), on each proof gallon."

(b) **EFFECTIVE DATE.**—The amendment made by this section shall apply to articles containing distilled spirits brought into the United States after September 30, 1985.

TITLE VII—COMPETITION IN CONTRACTING

SHORT TITLE

SEC. 2701. This title may be cited as the "Competition in Contracting Act of 1984".

Subtitle A—Amendments to the Federal Property and Administrative Services Act of 1949

PROCUREMENT PROCEDURES

SEC. 2711. (a)(1) Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended to read as follows:

"COMPETITION REQUIREMENTS

"SEC. 303. (a)(1) Except as provided in subsections (b), (c), and (g) and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services—

"(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

"(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

"(2) In determining the competitive procedures appropriate under the circumstance, an executive agency—

"(A) shall solicit sealed bids if—

"(i) time permits the solicitation, submission, and evaluation of sealed bids;

"(ii) the award will be made on the basis of price and other price-related factors;

"(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is a reasonable expectation of receiving more than one sealed bid; and

"(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

"(b)(1) An executive agency may provide for the procurement of property or services covered by this section using competitive procedures but excluding a particular source in order to establish or maintain any alternative source or sources of supply for that property or service if the agency head determines that to do so—

"(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of such property or services;

"(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

"(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

"(2) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, an executive agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

"(c) An executive agency may use procedures other than competitive procedures only when—

"(1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the needs of the executive agency;

"(2) the executive agency's need for the property or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the

number of sources from which it solicits bids or proposals;

"(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center;

"(4) the terms of an international agreement or treaty between the United States Government and a foreign government or international organization, or the written directions of a foreign government reimbursing the executive agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

"(5) a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

"(6) the disclosure of the executive agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

"(7) the head of the executive agency—

"(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned, and

"(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d)(1) For the purposes of applying subsection (c)(1)—

"(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

"(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the Government which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the executive agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

"(2) The authority of the head of an executive agency under subsection (c)(7) may not be delegated.

"(e) An executive agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

"(f)(1) Except as provided in paragraph (2), an executive agency may not award a contract using procedures other than competitive procedures unless—

"(A) the contracting officer for the contract justifies the use of such procedures in

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writing and certifies the accuracy and completeness of the justification;

"(B) the justification is approved—

"(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation);

"(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule (or in a comparable or higher position under another schedule); or

"(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

"(C) Any required notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to such notice have been considered by such executive agency.

"(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required in the case of a procurement permitted by subsection (c)(7) or in the case of a procurement conducted under the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The justification required by paragraph (1)(A) shall include—

"(A) a description of the agency's needs;

"(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

"(C) a determination that the anticipated cost will be fair and reasonable;

"(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

"(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

"(F) a statement of the actions, if any, the agency may take to remove or overcome a barrier to competition before a subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5, United States Code.

"(5) In no case may an executive agency—

"(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

"(B) procure property or services from another executive agency unless such other executive agency complies fully with the requirements of this title in its procurement of such property or services.

The restriction set out in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

"(p)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified, in accordance with section 2752 of the Competition in

Contracting Act of 1984 shall provide for special simplified procedures for small purchases of property and services.

"(2) For the purposes of this title, a small purchase is a purchase or contract for an amount which does not exceed \$25,000.

"(3) A proposed purchase or contract for an amount above \$25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

"(4) In using small purchase procedures, an executive agency shall promote competition to the maximum extent practicable."

"(2) Title III of such Act is further amended by inserting after section 303 the following new sections:

"PLANNING AND SOLICITATION REQUIREMENTS

"Sec. 303A. (a)(1) In preparing for the procurement of property or services, an executive agency shall—

"(A) specify its needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

"(B) use advance procurement planning and market research; and

"(C) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

"(2) Each solicitation under this title shall include specifications which—

"(A) consistent with the provisions of this title, permit full and open competition;

"(B) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the executive agency or as authorized by law.

"(3) For the purposes of paragraphs (1) and (2), the type of specification included in a solicitation shall depend on the nature of the needs of the executive agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(A) function, so that a variety of products or services may qualify;

"(B) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(C) design requirements.

"(b) In addition to the specifications described in subsection (a), each solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

"(1) a statement of—

"(A) all significant factors (including price) which the executive agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(B) the relative importance assigned to each of those factors; and

"(2)(A) in the case of sealed bids—

"(i) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; or

"(B) in the case of competitive proposals—

"(i) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"EVALUATION AND AWARD

"Sec. 303B. (a) An executive agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(b) All sealed bids or competitive proposals received in response to a solicitation

may be rejected if the agency head determines that such action is in the public interest.

"(c) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The executive agency shall evaluate the bids without discussions with the bidders and, except as provided in subsection (b), shall award a contract with reasonable promptness to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(d)(1) The executive agency shall evaluate competitive proposals and may award a contract—

"(A) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

"(B) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the Government.

"(2) In the case of award of a contract under paragraph (1)(A), the executive agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.

"(3) In the case of award of a contract under paragraph (1)(B), the executive agency shall award the contract based on the proposals as received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(4) Except as otherwise provided in subsection (b), the executive agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation. The executive agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals.

"(e) If the agency head considers that a bid or proposal evidences a violation of the antitrust laws, such agency head shall refer the bid or proposal to the Attorney General for appropriate action."

"(3) Section 309 of such Act (41 U.S.C. 259) is amended by adding at the end thereof the following new subsections:

"(b) The term 'competitive procedures' means procedures under which an executive agency enters into a contract pursuant to full and open competition. Such term also includes—

"(1) procurement of architectural or engineering services conducted in accordance with title IX of this Act (40 U.S.C. 541 et seq.);

"(2) the competitive selection of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals; and

"(3) the procedures established by the Administrator for the multiple awards schedule program of the General Services Administration."

"(A) participation in the program has been open to all responsible sources; and

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"(B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government.

"(c) The terms 'full and open competition' and 'responsible source' have the same meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 603)."

(b) The table of contents of such Act is amended by striking out the item relating to section 303 and inserting in lieu thereof the following:

"Sec. 303. Competition requirements.

"Sec. 303A. Planning and solicitation requirements.

"Sec. 303B. Evaluation and award."

(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

COST OR PRICING DATA

SEC. 2712. Section 304 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254) is amended by adding at the end thereof the following new subsection:

"(d)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractor's knowledge and belief, the cost or pricing data submitted were accurate, complete, and current—

"(A) before the award of any prime contract under this title using procedures other than sealed-bid procedures, if the contract price is expected to exceed \$100,000;

"(B) before the pricing of any contract change or modification, if the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the agency head;

"(C) before the award of a subcontract at any tier, when the prime contractor and each higher tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed \$100,000; or

"(D) before the pricing of any contract change or modification to a subcontract covered by clause (C), if the price adjustment is expected to exceed \$100,000, or such lesser amount as may be prescribed by the agency head.

"(2) Any prime contract or change or modification thereto under which a certificate is required under paragraph (1) shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the agency head that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the price as is practicable), were inaccurate, incomplete, or noncurrent.

"(3) For the purpose of evaluating the accuracy, completeness, and currency of cost or pricing data required to be submitted by this subsection, any authorized representative of the agency who is an employee of the United States Government shall have the right, until the expiration of three years after final payment under the contract or subcontract, to examine all books, records, documents, and other data of the contractor or subcontractor related to the proposal for the contract, the discussions conducted on the proposal, pricing, or performance of the contract or subcontract.

"(4) When cost or pricing data are not required to be submitted by this subsection,

such data may nevertheless be required by the agency if the agency head determines that such data are necessary for the evaluation by the executive agency of the reasonableness of the price of the contract or subcontract.

"(5) The requirements of this subsection need not be applied to contracts or subcontracts—

"(A) where the price is based on—

"(i) adequate price competition,

"(ii) established catalog or market prices of commercial items sold in substantial quantities to the general public, or

"(iii) prices set by law or regulation, or

"(B) in exceptional cases, where the agency head determines that the requirements of this subsection may be waived and states in writing the reasons for such determination."

AUTOMATED DATA PROCESSING DISPUTE
RESOLUTION

SEC. 2713. (a) Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is amended by adding at the end thereof the following new subsection:

"(h)(1) Upon request of an interested party in connection with any procurement conducted under the authority of this section (including procurements conducted under delegations of procurement authority), the board of contract appeals of the General Services Administration (hereafter in this subsection referred to as the 'board'), shall review any decision by a contracting officer alleged to violate a statute or regulation. Such review shall be conducted under the standard applicable to review of contracting officer final decisions by boards of contract appeals. An interested party who has filed a protest under subchapter V of chapter 35 of title 31, United States Code, with respect to a procurement or proposed procurement may not file a protest with respect to that procurement or proposed procurement under this subsection.

"(2)(A) When a protest under this subsection is filed before the award of a contract in a protested procurement, the board, at the request of an interested party and within 10 days of the filing of the protest, shall hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the protested procurement on an interim basis until the board can decide the protest.

"(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority unless the Federal agency concerned establishes that—

"(i) absent action by the board, contract award is likely to occur within 30 days of the hearing; and

"(ii) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

"(3)(A) If the Board receives notice of a protest under this subsection after the contract has been awarded but within 10 days after the contract award, the board shall, at the request of an interested party and within 10 days after the date of the filing of the protest, hold a hearing to determine whether the board should suspend the procurement authority of the Administrator or the Administrator's delegation of procurement authority for the challenged procurement on an interim basis until the board can decide the protest.

"(B) The board shall suspend the procurement authority of the Administrator or the Administrator's delegation of procurement

authority to acquire any goods or services under the contract which are not previously delivered and accepted unless the Federal agency concerned establishes that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the board.

"(4)(A) The board shall conduct such proceedings and allow such discovery as may be required for the expeditious, fair, and reasonable resolution of the protest.

"(B) Subject to any deadlines imposed by section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)), the board shall give priority to protests filed under this subsection. The board shall issue its final decision within 45 working days after the date of the filing of the protest, unless the board's chairman determines that the specific and unique circumstances of the protest require a longer period, in which case the board shall issue such decision within the longer period determined by the chairman.

"(C) The board may dismiss a protest the board determines is frivolous or which, on its face, does not state a valid basis for protest.

"(5)(A) In making a decision on the merits of protests brought under this section, the board shall accord due weight to the policies of this section and the goals of economic and efficient procurement set forth in this section.

"(B) If the board determines that a challenged agency action violates a statute or regulation or the conditions of any delegation of procurement authority issued pursuant to this section, the board may suspend, revoke, or revise the procurement authority of the Administrator or the Administrator's delegation of procurement authority applicable to the challenged procurement.

"(C) Whenever the board makes such a determination, it may, in accordance with section 1304 of title 31, United States Code, further declare an appropriate interested party to be entitled to the costs of—

"(i) filing and pursuing the protest, including reasonable attorney's fees, and

"(ii) bid and proposal preparation.

"(6)(A) The final decision of the board may be appealed by the head of the Federal agency concerned and by any interested party, including interested parties who intervene in any protest filed under this subsection, as set forth in the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

"(B) If the board revokes, suspends, or revises the procurement authority of the Administrator or the Administrator's delegation of procurement authority after the contract award, the affected contract shall be presumed valid as to all goods or services delivered and accepted under the contract before the suspension, revocation, or revision of such procurement authority or delegation.

"(C) Nothing contained in this subsection shall affect the board's power to order any additional relief which it is authorized to provide under any statute or regulation. However, the procedures set forth in this subsection shall only apply to procurements conducted under the authority contained in this section. In addition, nothing contained in this subsection shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court.

"(8) Not later than January 15, 1985, the board shall adopt and issue such rules and procedures as may be necessary to the expeditious disposition of protests filed under the authority of this subsection.

"(9) For purposes of this subsection—

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"(A) the term 'protest' means a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection to a proposed award or the award of such a contract; and

"(B) the term 'interested party' means, with respect to a contract or proposed contract described in subparagraph (A), an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."

(b) The amendment made by this section shall cease to be effective on January 15, 1988.

CONFORMING AMENDMENTS

SEC. 2714. (a)(1) Section 302 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 252) is amended—

(A) by striking out the second sentence in subsection (b); and

(B) by striking out subsections (c), (d), (e), and (f) and inserting in lieu thereof the following:

"(c)(1) This title does not (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items using procedures other than sealed-bid procedures under section 303(a)(2)(A), if the conditions set forth in section 303(a)(2)(A) apply or the contract is to be performed outside the United States.

"(2) Section 303(a)(2)(A) does not require the use of sealed-bid procedures in cases in which section 204(c) of title 23, United States Code, applies."

(2) The heading of section 304 of such Act (41 U.S.C. 254) is amended to read as follows:

"CONTRACT REQUIREMENTS"

(3) Section 304 of such Act (41 U.S.C. 254) is amended—

(A) by striking out "negotiated pursuant to section 302(c)" in the first sentence of subsection (a) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures";

(B) by striking out "negotiated pursuant to section 302(c)" in the second sentence of subsection (a) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures"; and

(C) by striking out "negotiated without advertising pursuant to authority contained in this Act" in the first sentence of subsection (c) and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures".

(4) Section 307 of such Act (41 U.S.C. 257) is amended—

(A) by striking out the first sentence of subsection (a) and inserting in lieu thereof the following: "Determinations and decisions provided in this Act to be made by the Administrator or other agency head shall be final. Such determinations or decisions may be made with respect to individual purchases or contracts or, except for determinations or decisions under sections 303, 303A, and 303B, with respect to classes of purchases or contracts."

(B) by striking out "Except as provided in subsection (b)," in the second sentence of subsection (a) and inserting in lieu thereof "Except as provided in section 303(d)(2).";

(C) by striking out "this chapter" in such sentence and inserting in lieu thereof "this Act";

(D) by striking out subsection (b);

(E) by striking out "by paragraphs (11), (12), (13), or (14) of section 302(c)," in subsection (c);

(F) by redesignating subsection (c) as subsection (b); and

(G) by striking out subsection (d).

(5) Section 308 of such Act (41 U.S.C. 258) is amended by striking out "entered into pursuant to section 302(c) without advertising;" and inserting in lieu thereof "made or awarded after using procedures other than sealed-bid procedures".

(6) Section 310 of such Act (41 U.S.C. 260) is amended by striking out "section 302(c)(15) of this title without regard to the advertising requirements of sections 302(c) and 303" and inserting in lieu thereof "the provisions of this title relating to procedures other than sealed-bid procedures".

(b) The table of contents of such Act is amended by striking out the item relating to section 304 and inserting in lieu thereof the following:

"Sec. 304. Contract requirements."

Subtitle B—Amendments To Title 10, United States Code

DECLARATION OF POLICY

SEC. 2721. Section 2301 of title 10, United States Code, is amended to read as follows:

"§ 2301. Congressional defense procurement policy

"(a) The Congress finds that in order to ensure national defense preparedness, conserve fiscal resources, and enhance defense production capability, it is in the interest of the United States that property and services be acquired for the Department of Defense in the most timely, economic, and efficient manner. It is therefore the policy of Congress that—

"(1) full and open competitive procedures shall be used by the Department of Defense in accordance with the requirements of this chapter;

"(2) services and property (including weapon systems and associated items) for the Department of Defense be acquired by any kind of contract, other than cost-plus-a-percentage-of-cost contracts, but including multiyear contracts, that will promote the interest of the United States;

"(3) contracts, when appropriate, provide incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology;

"(4) contracts for advance procurement of components, parts, and materials necessary for manufacture or for logistics support of a weapon system should, if feasible and practicable, be entered into in a manner to achieve economic lot purchases and more efficient production rates;

"(5) the head of an agency use advance procurement planning and market research and prepare contract specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired; and

"(6) the head of an agency encourage the development and maintenance of a procurement career management program to ensure a professional procurement work force.

"(b) Further, it is the policy of Congress that procurement policies and procedures for the agencies named in section 2303 of this title shall in accordance with the requirements of this chapter—

"(1) promote full and open competition;

"(2) be implemented to support the requirements of such agencies in time of war or national emergency as well as in peacetime;

"(3) promote responsiveness of the procurement system to agency needs by simplifying and streamlining procurement processes;

"(4) promote the attainment and maintenance of essential capability in the defense

industrial base and the capability of the United States for industrial mobilization;

"(5) provide incentives to encourage contractors to take actions and make recommendations that would reduce the costs to the United States relating to the purchase or use of property or services to be acquired under contracts;

"(6) promote the use of commercial products whenever practicable; and

"(7) require descriptions of agency requirements, whenever practicable, in terms of functions to be performed or performance required.

"(c) Further, it is the policy of Congress that a fair proportion of the purchases and contracts entered into under this chapter be placed with small business concerns."

CLARIFICATION OF APPLICABILITY OF CHAPTER 137 OF TITLE 10 TO THE SECRETARY OF DEFENSE: DEFINITIONS

SEC. 2722. (a) Section 2302 of title 10, United States Code, is amended to read as follows:

"§ 2302. Definitions

"In this chapter:

"(1) 'Head of an agency' means the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, the Secretary of Transportation, and the Administrator of the National Aeronautics and Space Administration.

"(2) 'Competitive procedures' means procedures under which the head of an agency enters into a contract pursuant to full and open competition. Such term also includes—

"(A) procurement of architectural or engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 541 et seq.);

"(B) the competitive selection for award of basic research proposals resulting from a general solicitation and the peer review or scientific review (as appropriate) of such proposals; and

"(C) the procedures established by the Administrator of General Services for the multiple award schedule program of the General Services Administration if—

"(i) participation in the program has been open to all responsible sources; and

"(ii) orders and contracts under such program result in the lowest overall cost alternative to meet the needs of the United States.

"(3) The terms 'full and open competition' and 'responsible source' have the same meanings provided such terms in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)."

(b) Section 2303 of such title is amended—

(1) in subsection (a)—

(A) by striking out "purchase, and contract to purchase," and inserting in lieu thereof "procurement";

(B) by striking out "named in subsection (b), and all services," and inserting in lieu thereof "(other than land) and all services";

(C) by redesignating clauses (1) through (5) as clauses (2) through (6), respectively; and

(D) by inserting before clause (2) (as so redesignated) the following new clause:

"(1) The Department of Defense."

(2) by striking out subsection (b); and

(3) by redesignating subsection (c) as subsection (b).

PROCUREMENT PROCEDURES

SEC. 2723. (a)(1) Section 2304 of title 10, United States Code, is amended—

(A) by striking out subsections (a) through (e) and (g), (h), and (i);

(B) by redesignating subsection (f) as subsection (h); and

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(C) by inserting after the section heading the following:

"(a)(1) Except as provided in subsections (b), (c), and (p) and except in the case of procurement procedures otherwise expressly authorized by statute, the head of an agency in conducting a procurement for property or services—

"(A) shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this chapter and the modifications to regulations promulgated pursuant to section 2752 of the Competition in Contracting Act of 1984; and

"(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

"(2) In determining the competitive procedure appropriate under the circumstances, the head of an agency—

"(A) shall solicit sealed bids if—

"(i) time permits the solicitation, submission, and evaluation of sealed bids;

"(ii) the award will be made on the basis of price and other price-related factors;

"(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is a reasonable expectation of receiving more than one sealed bid; and

"(B) shall request competitive proposals if sealed bids are not appropriate under clause (A).

"(b)(1) The head of an agency may provide for the procurement of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply for that property or service if the head of the agency determines that to do so—

"(A) would increase or maintain competition and would likely result in reduced overall costs for such procurement, or for any anticipated procurement, of property or services;

"(B) would be in the interest of national defense in having a facility (or a producer, manufacturer, or other supplier) available for furnishing the property or service in case of a national emergency or industrial mobilization; or

"(C) would be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

"(2) In fulfilling the statutory requirements relating to small business concerns and socially and economically disadvantaged small business concerns, the head of an agency shall use competitive procedures but may restrict a solicitation to allow only such business concerns to compete.

"(c) The head of an agency may use procedures other than competitive procedures only when—

"(1) the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency;

"(2) the agency's need for the property or services is of such an unusual and compelling urgency that the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;

"(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization, or (B) to establish or maintain an

essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center.

"(4) The terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures;

"(5) a statute expressly authorizes or requires that the procurement be made through another agency or from a specified source, or the agency's need is for a brand-name commercial item for authorized resale;

"(6) the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals; or

"(7) the head of the agency—

"(A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned; and

"(B) notifies the Congress in writing of such determination not less than 30 days before the award of the contract.

"(d)(1) For the purposes of applying subsection (c)(1)—

"(A) in the case of a contract for property or services to be awarded on the basis of acceptance of an unsolicited research proposal, the property or services shall be considered to be available from only one source if the source has submitted an unsolicited research proposal that demonstrates a unique and innovative concept the substance of which is not otherwise available to the United States and does not resemble the substance of a pending competitive procurement; and

"(B) in the case of a follow-on contract for the continued development or production of a major system or highly specialized equipment when it is likely that award to a source other than the original source would result in (i) substantial duplication of cost to the United States which is not expected to be recovered through competition, or (ii) unacceptable delays in fulfilling the agency's needs, such property may be deemed to be available only from the original source and may be procured through procedures other than competitive procedures.

"(2) The authority of the head of an agency under subsection (c)(7) may not be delegated.

"(e) The head of an agency using procedures other than competitive procedures to procure property or services by reason of the application of subsection (c)(2) or (c)(6) shall request offers from as many potential sources as is practicable under the circumstances.

"(f)(1) Except as provided in paragraph (2), the head of an agency may not award a contract using procedures other than competitive procedures unless—

"(A) the contracting officer for the contract justifies the use of such procedures in writing and certifies the accuracy and completeness of the justification;

"(B) the justification is approved—

"(i) in the case of a contract for an amount exceeding \$100,000 (but equal to or less than \$1,000,000), by the competition advocate for the procuring activity (without further delegation);

"(ii) in the case of a contract for an amount exceeding \$1,000,000 (but equal to or less than \$10,000,000), by the head of the procuring activity or a delegate who, if a

member of the armed forces, is a general or flag officer or, if a civilian, is serving in a position in grade GS-16 or above under the General Schedule for in a comparable or higher position under another schedule); or

"(iii) in the case of a contract for an amount exceeding \$10,000,000, by the senior procurement executive of the agency designated pursuant to section 16(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(3)) (without further delegation); and

"(C) any required notice has been published with respect to such contract pursuant to section 18 of the Office of Federal Procurement Policy Act and all bids or proposals received in response to that notice have been considered by the head of the agency.

"(2) In the case of a procurement permitted by subsection (c)(2), the justification and approval required by paragraph (1) may be made after the contract is awarded. The justification and approval required by paragraph (1) is not required in the case of a procurement permitted by subsection (c)(7) or in the case of a procurement conducted under the Act of June 25, 1938 (41 U.S.C. 46 et seq.), popularly referred to as the Wagner-O'Day Act.

"(3) The justification required by paragraph (1)(A) shall include—

"(A) a description of the agency's needs;

"(B) an identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception;

"(C) a determination that the anticipated cost will be fair and reasonable;

"(D) a description of the market survey conducted or a statement of the reasons a market survey was not conducted;

"(E) a listing of the sources, if any, that expressed in writing an interest in the procurement; and

"(F) a statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs.

"(4) The justification required by paragraph (1)(A) and any related information shall be made available for inspection by the public consistent with the provisions of section 552 of title 5.

"(5) In no case may the head of an agency—

"(A) enter into a contract for property or services using procedures other than competitive procedures on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions; or

"(B) procure property or services from another agency unless such other agency complies fully with the requirements of this chapter in its procurement of such property or services.

The restriction contained in clause (B) is in addition to, and not in lieu of, any other restriction provided by law.

"(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the regulations modified in accordance with section 2752 of the Competition in Contracting Act of 1984 shall provide for special simplified procedures for small purchases of property and services.

"(2) For the purposes of this chapter, a small purchase is a purchase or contract for an amount which does not exceed \$25,000.

"(3) A proposed purchase or contract for an amount above \$25,000 may not be divided into several purchases or contracts for lesser amounts in order to use the small purchase procedures required by paragraph (1).

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"(4) In using small purchase procedures, the head of an agency shall promote competition to the maximum extent practicable".

(2) The heading of such section is amended to read as follows:

"§2304. Contracts: competition requirements".

(b) Section 2305 of such title is amended to read as follows:

"§2305. Contracts: planning, solicitation, evaluation, and award procedures

"(a)(1)(A) In preparing for the procurement of property or services, the head of an agency shall—

"(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

"(ii) use advance procurement planning and market research; and

"(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

"(B) Each solicitation under this chapter shall include specifications which—

"(i) consistent with the provisions of this chapter, permit full and open competition; and

"(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.

"(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—

"(i) function, so that a variety of products or services may qualify;

"(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or

"(iii) design requirements.

"(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for small purchases) shall at a minimum include—

"(A) a statement of—

"(i) all significant factors (including price) which the head of the agency reasonably expects to consider in evaluating sealed bids or competitive proposals; and

"(ii) the relative importance assigned to each of those factors; and

"(B)(i) in the case of sealed bids—

"(1) a statement that sealed bids will be evaluated without discussions with the bidders; and

"(ii) the time and place for the opening of the sealed bids; or

"(iii) in the case of competitive proposals—

"(1) a statement that the proposals are intended to be evaluated with, and awards made after, discussions with the offerors, but might be evaluated and awarded without discussions with the offerors; and

"(ii) the time and place for submission of proposals.

"(b)(1) The head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

"(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

"(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids without discussions with the bidders and, except as provided in paragraph (2),

shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting written notice of the award to the successful bidder.

"(1)(A) The head of an agency shall evaluate competitive proposals and may award a contract—

"(i) after discussions conducted with the offerors at any time after receipt of the proposals and before the award of the contract; or

"(ii) without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) when it can be clearly demonstrated from the existence of full and open competition or accurate prior cost experience with the product or service that acceptance of an initial proposal without discussions would result in the lowest overall cost to the United States.

"(B) In the case of award of a contract under subparagraph (A)(i), the head of the agency shall conduct, before such award, written or oral discussions with all responsible sources who submit proposals within the competitive range, considering only price and the other factors included in the solicitation.

"(C) In the case of award of a contract under subparagraph (A)(ii), the head of the agency shall award the contract based on the proposals received (and as clarified, if necessary, in discussions conducted for the purpose of minor clarification).

"(D) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting written notice of the award to such source and shall promptly notify all other offerors of the rejection of their proposals.

"(5) If the head of an agency considers that a bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action."

(c) The amendments made by this section do not supersede or affect the provisions of section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

COST OR PRICING DATA; CONFORMING AMENDMENTS

SEC. 2724. (a) The second sentence of subsection (a) of section 2306 of title 10, United States Code, is amended to read as follows:

"Subject to the limitation in the preceding sentence, the other provisions of this section, and other applicable provisions of law, the head of an agency, in awarding contracts under this chapter after using procedures other than sealed-bid procedures, may enter into any kind of contract that he considers will promote the best interests of the United States."

(b) Subsection (b) of such section is amended by striking out "negotiated under section 2304" in the first sentence of subsection (b) and inserting in lieu thereof "awarded under this chapter after using procedures other than sealed-bid procedures".

(c) Subsection (c) of such section is amended by striking out "section 2304 of this title," and inserting in lieu thereof "this chapter".

(d) Subsection (e) of such section is amended by striking out "\$25,000 or" in clause (2) and inserting in lieu thereof "the

greater of (A) the small purchase amount under section 2304(g) of this title, or (B)".

(e) Subsection (f) of such section is amended—

(A) in paragraph (1)—

(i) by striking out "his" in the matter preceding clause (A) and inserting in lieu thereof "such contractor's or subcontractor's"

(ii) by striking out "he" in the matter preceding clause (A)

(iii) by striking out "negotiated prime contract under this title where" in clause (A) and inserting in lieu thereof "prime contract under this chapter entered into after using procedures other than sealed-bid procedures, if";

(iv) by striking out "for which" in clauses (B) and (D) and inserting in lieu thereof "if";

(v) by striking out "where" in clause (C) and inserting in lieu thereof "when";

(vi) by striking out "\$500,000" each place it appears and inserting in lieu thereof "\$100,000"; and

(vii) by striking out "prior to" each place it appears and inserting in lieu thereof "before";

(B) in paragraph (2), by striking out "negotiated" both places it appears;

(C) by redesignating paragraph (3) as paragraph (5) and striking out "negotiation," in such paragraph and inserting in lieu thereof "proposal for the contract, the discussions conducted on the proposal";

(D) by inserting a period after "noncurrent" in paragraph (2);

(E) by striking out "Provided, That the requirements" in paragraph (2) and inserting in lieu thereof the following:

"(3) The requirements"; and

(F) by inserting after paragraph (3) (as designated by clause (E)) the following new paragraph:

"(4) When cost or pricing data is not required to be submitted by this subsection, such data may nevertheless be required by the head of the agency if the head of the agency determines that such data is necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract."

(f) The heading of such section is amended to read as follows:

"§2306. Kinds of contracts; cost or pricing data; truth in negotiation".

DETERMINATIONS AND DECISIONS

SEC. 2725. Section 2310 of title 10, United States Code, is amended—

(1) in subsection (a)—

(A) by inserting ", except for determinations and decisions under section 2304 or 2305 of title," in the first sentence after "contract or"; and

(B) by inserting ", including a determination or decision under section 2304 or 2305 of this title," in the second sentence after "decision"; and

(2) by striking out subsection (b) and inserting in lieu thereof the following:

"(b) Each determination or decision under section 2306(c), 2306(g)(1), 2307(c), or 2313(c) of this title shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that—

"(1) clearly indicate why the type of contract selected under section 2306(c) of this title is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract;

"(2) support the findings required by section 2306(g)(1) of this title;

"(3) clearly indicate why advance payments under section 2307(c) of this title would be in the public interest; or

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"(4) clearly indicate why the application of section 2313(b) of this title to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest.

Such a finding is final and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies."

LIMITATION ON AUTHORITY TO DELEGATE

CERTAIN FUNCTIONS

SEC. 2726. Section 2311 of title 10, United States Code, is amended—

(1) by striking out "The head" and inserting in lieu thereof "Except as provided in section 2304(d)(2) of this title, the head"; and

(2) by striking out "chapter" and all that follows and inserting in lieu thereof "chapter."

CONFORMING AMENDMENTS

SEC. 2727. (a) The table of sections at the beginning of chapter 137 of title 10, United States Code, is amended—

(1) by striking out the item relating to section 2301 and inserting in lieu thereof the following:

"2301. Congressional defense procurement policy."; and

(2) by striking out the items relating to sections 2304, 2305, and 2306 and inserting in lieu thereof the following:

"2304. Contracts: competition requirements.

"2305. Contracts: planning, solicitation, evaluation, and award procedures.

"2306. Kinds of contracts; cost or pricing data; truth in negotiation."

(b) Subsection (h) of section 2304 of such title (as redesignated by section 2723(a)(1)(B)) is amended—

(1) by striking out "negotiated under this section" and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures"; and

(2) by striking out "formal advertising" and inserting in lieu thereof "sealed-bid procedures".

(c) Section 2313(b) of such title is amended by striking out "negotiated under this chapter" and inserting in lieu thereof "awarded after using procedures other than sealed-bid procedures".

(d) Section 2356 of such title is amended by striking out "the formal advertising prescribed by section 2305 of this title" and inserting in lieu thereof "a solicitation for sealed bids under chapter 137 of this title".

Subtitle C—Amendments to the Office of Federal Procurement Policy Act

DEFINITIONS

SEC. 2731. The section of the Office of Federal Procurement Policy Act relating to definitions (41 U.S.C. 403) is redesignated as section 4 and is amended—

(1) by striking out "and" at the end of paragraph (4);

(2) by striking out the period at the end of paragraph (5) and inserting in lieu thereof "; and"; and

(3) by adding at the end thereof the following new paragraphs:

"(6) the term 'competitive procedures' means procedures under which an agency enters into a contract pursuant to full and open competition;

"(7) the term 'full and open competition', when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement; and

"(8) the term 'responsible source' means a prospective contractor who—

"(A) has adequate financial resources to perform the contract or the ability to obtain such resources;

"(B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;

"(C) has a satisfactory performance record;

"(D) has a satisfactory record of integrity and business ethics;

"(E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;

"(F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and

"(G) is otherwise qualified and eligible to receive an award under applicable laws and regulations."

PROCUREMENT NOTICE AND RECORDS; ADVOCATES FOR COMPETITION

SEC. 2732. (a) The Office of Federal Procurement Policy Act is further amended by adding at the end thereof, the following new sections:

"PROCUREMENT NOTICE

"SEC. 18. (a)(1) Except as provided in subsection (c)—

"(A) an executive agency intending to solicit bids or proposals for a contract for property or services for a price expected to exceed \$10,000 shall furnish for publication by the Secretary of Commerce a notice described in subsection (b); and

"(B) an executive agency awarding a contract for property or services for a price exceeding \$25,000 shall furnish for publication by the Secretary of Commerce a notice announcing such award if there is likely to be any subcontract under such contract.

"(2) The Secretary of Commerce shall publish promptly in the Commerce Business Daily each notice required by paragraph (1).

"(3) Whenever an executive agency is required by paragraph (1)(A) to furnish a notice of a solicitation to the Secretary of Commerce, such executive agency may not—

"(A) issue such solicitation earlier than 15 days after the date on which such notice is published by the Secretary of Commerce; or

"(B) establish a deadline for the submission of all bids or proposals in response to such solicitation that is earlier than 30 days after the date on which such solicitation is issued.

"(b) Each notice required by subsection (a)(1)(A) shall include—

"(1) an accurate description of the property or services to be contracted for, which description is not unnecessarily restrictive of competition;

"(2) the name, business address, and telephone number of the officer or employee of the executive agency who may be contacted for the purpose of obtaining a copy of the solicitation;

"(3) the name, business address, and telephone number of the contracting officer;

"(4) a statement that all responsible sources may submit a bid, proposal, or quotation which shall be considered by the executive agency; and

"(5) in the case of a procurement using procedures other than competitive procedures, a statement of the reason justifying the use of such procedures and the identity of the intended source.

"(c)(1) A notice is not required under subsection (a)(1) if—

"(A) the notice would disclose the executive agency's needs and the disclosure of such needs would compromise the national security;

"(B) the proposed procurement would result from acceptance of any unsolicited proposal that demonstrates a unique and innovative research concept, and the publication of any notice of such unsolicited research proposal would disclose the originality of thought or innovativeness of the proposal or would disclose proprietary information associated with the proposal;

"(C) the procurement is made against an order placed under a requirements contract, or

"(D) the procurement is made for perishable subsistence supplies.

"(2) The requirements of subsection (a)(1)(A) do not apply to any procurement under conditions described in clause (2), (3), (4), (5), or (7) of section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or clause (2), (3), (4), (5), or (7) of section 2304(c) of title 10, United States Code.

"(3) The requirements of subsection (a)(1)(A) shall not apply in the case of any procurement for which the head of the executive agency makes a determination in writing, with the concurrence of the Administrator, that it is not appropriate or reasonable to publish a notice before issuing a solicitation.

"RECORD REQUIREMENTS

"SEC. 19. (a) Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements, other than small purchases, in such fiscal year.

"(b) The record established under subsection (a) shall include—

"(1) with respect to each procurement carried out using competitive procedures—

"(A) the date of contract award;

"(B) information identifying the source to whom the contract was awarded;

"(C) the property or services obtained by the Government under the procurement; and

"(D) the total cost of the procurement;

"(2) with respect to each procurement carried out using procedures other than competitive procedures—

"(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

"(B) the reason under section 303(c) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) or section 2304(c) of title 10, United States Code, as the case may be, for the use of such procedures; and

"(C) the identity of the organization or activity which conducted the procurement.

"(c) The information that is included in such record pursuant to subsection (b)(1) and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated 'noncompetitive procurements using competitive procedures'.

"(d) The information included in the record established and maintained under subsection (a) shall be transmitted to the General Services Administration and shall be entered in the Federal Procurement Data System referred to in section 6(d)(4).

"ADVOCATES FOR COMPETITION

"SEC. 20. (a)(1) There is established in each executive agency an advocate for competition.

"(2) The head of each executive agency shall—

"(A) designate for the executive agency and for each procuring activity of the executive agency one officer or employee serving in a position authorized for such executive

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agency on the date of enactment of the Competition in Contracting Act of 1984 (other than the senior procurement executive designated pursuant to section 1613) to serve as the advocate for competition;

"(B) not assign such officers or employees any duties or responsibilities that are inconsistent with the duties and responsibilities of the advocates for competition; and

"(C) provide such officers or employees with such staff or assistance as may be necessary to carry out the duties and responsibilities of the advocate for competition, such as persons who are specialists in engineering, technical operations, contract administration, financial management, supply management, and utilization of small and disadvantaged business concerns.

"(b) The advocate for competition of an executive agency shall—

"(1) be responsible for challenging barriers to and promoting full and open competition in the procurement of property and services by the executive agency;

"(2) review the procurement activities of the executive agency;

"(3) identify and report to the senior procurement executive of the executive agency designated pursuant to section 1613—

"(A) opportunities and actions taken to achieve full and open competition in the procurement activities of the executive agency; and

"(B) any condition or action which has the effect of unnecessarily restricting competition in the procurement actions of the executive agency; and

"(4) prepare and transmit to such senior procurement executive an annual report describing—

"(A) such advocate's activities under this section;

"(B) new initiatives required to increase competition; and

"(C) barriers to full and open competition that remain;

"(5) recommend to the senior procurement executive of the executive agency goals and the plans for increasing competition on a fiscal year basis;

"(6) recommend to the senior procurement executive of the executive agency a system of personal and organizational accountability for competition, which may include the use of recognition and awards to motivate program managers, contracting officers, and others in authority to promote competition in procurement programs; and

"(7) describe other ways in which the executive agency has emphasized competition in programs for procurement training and research.

"(c) The advocate for competition for each procuring activity shall be responsible for challenging barriers to and promoting full and open competition in the procuring activity, including unnecessarily detailed specifications and unnecessarily restrictive statements of need.

"ANNUAL REPORT ON COMPETITION"

"SEC. 21. (a) Not later than January 31 of each of 1986, 1987, 1988, 1989, and 1990, the head of each executive agency shall transmit to each House of Congress a report including the information specified in subsection (b).

"(b) Each report under subsection (a) shall include—

"(1) a specific description of all actions that the head of the executive agency intends to take during the current fiscal year to—

"(A) increase competition for contracts with the executive agency on the basis of cost and other significant factors; and

"(B) reduce the number and dollar value of noncompetitive contracts entered into by the executive agency; and

"(2) a summary of the activities and accomplishments of the advocate for competition of the executive agency during the preceding fiscal year."

(b)(1) Section 6(e) of such Act (41 U.S.C. 405(e)) is amended by striking out "subsection (c)" and inserting in lieu thereof "subsection (d)".

(2) Section 1613 of such Act (41 U.S.C. 414(1)) is amended to read as follows:

"(1) increase the use of full and open competition in the procurement of property or services by the executive agency by establishing policies, procedures, and practices that assure that the executive agency receives a sufficient number of sealed bids or competitive proposals from responsible sources to fulfill the Government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or service procured;"

Subtitle D—Procurement Protest System

PROCUREMENT PROTEST SYSTEM

SEC. 2741. (a) Chapter 35 of title 31, United States Code, is amended by adding at the end thereof the following new subchapter:

"SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

"§ 3551. Definitions

"In this subchapter—

"(1) 'protest' means a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract;

"(2) 'interested party', with respect to a contract or proposed contract described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract; and

"(3) 'Federal agency' has the meaning given such term by section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472).

"§ 3552. Protests by interested parties concerning procurement actions

"A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter. An interested party who has filed a protest under section 111(h) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(h)) with respect to a procurement or proposed procurement may not file a protest with respect to that procurement under this subchapter.

"§ 3553. Review of protests; effect on contracts pending decision

"(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.

"(b)(1) Within one working day of the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.

"(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement—

"(A) within 25 working days from the date of the agency's receipt of that notice;

"(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require

a longer period, within the longer period determined by the Comptroller General; or

"(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within 10 working days from the date of the Federal agency's receipt of that determination.

"(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(3) of this title.

"(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

"(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

"(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

"(B) after the Comptroller General is advised of that finding.

"(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days thereafter.

"(d)(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but within 10 days of the date of the contract award, the Federal agency (except as provided under paragraph (2)) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

"(2) The head of the procuring activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

"(A) upon a written finding—

"(i) that performance of the contract is in the best interests of the United States; or

"(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

"(B) after the Comptroller General is notified of that finding.

"(e) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (c) and (d) of this section may not be delegated.

"(f) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive.

"§ 3554. Decisions on protests

"(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter.

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Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 90 working days from the date the protest is submitted to the Comptroller General unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period.

"(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 45 calendar days from the date the protest is submitted.

"(3) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

"(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—

"(A) refrain from exercising any of its options under the contract;

"(B) recomplete the contract immediately;

"(C) issue a new solicitation;

"(D) terminate the contract;

"(E) award a contract consistent with the requirements of such statute and regulation;

"(F) implement any combination of recommendations under clauses (A), (B), (C), (D), and (E); or

"(G) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

"(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(2)(A)(i) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

"(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—

"(A) filing and pursuing the protest, including reasonable attorneys' fees; and

"(B) bid and proposal preparation.

"(2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services.

"(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

"(e)(1) The head of the procuring activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented those recommendations within 60 days of receipt of

the Comptroller General's recommendations under subsection (b) of this section.

"(2) Not later than January 31 of each year, the Comptroller General shall transmit to Congress a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year.

"3555. Regulations; authority of Comptroller General to verify assertions

"(a) Not later than January 15, 1985, the Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for The filing.

"(b) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

"3556. Nonexclusivity of remedies; matters included in agency record

"This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in a district court of the United States or the United States Claims Court. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

"(b) The analysis for such chapter is amended by adding at the end thereof the following:

"SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM

"3551. Definitions.

"3552. Protests by interested parties concerning procurement actions.

"3553. Review of protests; effect on contracts pending decision.

"3554. Decisions on protests.

"3555. Regulations; authority of Comptroller General to verify assertions.

"3556. Nonexclusivity of remedies; matters included in agency record."

Subtitle E—Effective Date; Regulations; Study EFFECTIVE DATES

SEC. 2751. (a) Except as provided in subsection (b), the amendments made by this title shall apply with respect to any solicitation for bids or proposals issued after March 31, 1985.

(b) The amendments made by section 2713 and subtitle D shall apply with respect to any protest filed after January 14, 1985.

MODIFICATION OF FEDERAL ACQUISITION REGULATIONS

SEC. 2752. Not later than March 31, 1985, the single Government-wide procurement regulation referred to in section 414(A) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(4)(A)) shall be modified to conform to the requirements of this title and the amendments made by this title.

STUDY OF ALTERNATIVES

SEC. 2753. (a) Not later than January 31, 1985, the Administrator of the Office of Fed-

eral Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration, shall complete a study of alternatives and recommend to the Committee on Governmental Affairs of the Senate and the Committee on Governmental Operations of the House of Representatives a plan to increase the opportunities to achieve full and open competition on the basis of technical qualifications, quality, and other factors in the procurement of professional, technical, and managerial services.

(b) Such plan shall provide for testing the recommended alternative and be developed in accordance with section 15 of the Office of Federal Procurement Policy Act (41 U.S.C. 413), and be consistent with the policies set forth in section 2 of such Act (41 U.S.C. 401).

TITLE VIII—FEDERAL CREDIT UNION ACT AMENDMENTS

SEC. 2801. Section 201(b)(18) of the Federal Credit Union Act (12 U.S.C. 1781(b)(18)) is amended to read as follows:

"(18) to pay and maintain its deposit and to pay the premium charges for insurance imposed by this title; and"

SEC. 2802. Section 202 (b) of the Federal Credit Union Act (12 U.S.C. 1782(b)) is amended to read as follows:

"(b)(1) For each insurance year, each insured credit union which became insured prior to the beginning of that year shall file with the Board, at such time as the Board prescribes, a certified statement showing the total amount of insured shares in the credit union at the close of the preceding insurance year and both the amount of its deposit or adjustment thereof and the amount of the premium charge for insurance due to the fund for that year, both as computed under subsection (c) of this section.

"(2) The certified statements required to be filed with the Board pursuant to this subsection shall be in such form and shall set forth such supporting information as the Board shall require.

"(3) Each such statement shall be certified by the president of the credit union, or by any officer of the credit union designated by its board of directors, that to the best of his knowledge and belief that statement is true, correct, and complete and in accordance with this title and regulations issued thereunder."

SEC. 2803. Section 202(c) of the Federal Credit Union Act (12 U.S.C. 1782(c)) is amended—

(1) by striking out paragraph (2);

(2) by redesignating paragraph (1) as paragraph (2);

(3) by striking out "Except as provided in paragraph (2) of this subsection, each" in paragraph (2), as redesignated, and inserting in lieu thereof "Each";

(4) by striking out "on or before January 31, of each insurance year" in paragraph (2), as redesignated, and inserting in lieu thereof "at such time as the Board prescribes";

(5) by striking out "member accounts" in paragraph (2), as redesignated, and inserting in lieu thereof "insured shares"; and

(6) by inserting before paragraph (2) the following:

"(1)(A)(i) Each insured credit union shall pay to and maintain with the National Credit Union Share Insurance Fund a deposit in an amount equaling 1 per centum of the credit union's insured shares.

"(ii) The Board may, in its discretion, authorize insured credit unions to initially fund such deposit over a period of time in excess of one year if necessary to avoid ad-

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verse effects on the condition of insured credit unions.

"(iii) The amount of each insured credit union's deposit shall be adjusted annually, in accordance with procedures determined by the Board, to reflect changes in the credit union's insured shares.

"(B)(i) The deposit shall be returned to an insured credit union in the event that its insurance coverage is terminated, it converts to insurance coverage from another source, or in the event the operations of the fund are transferred from the National Credit Union Administration Board.

"(ii) The deposit shall be returned in accordance with procedures and valuation methods determined by the Board, but in no event shall the deposit be returned any later than one year after the final date on which no shares of the credit union are insured by the Board.

"(iii) The deposit shall not be returned in the event of liquidation on account of bankruptcy or insolvency.

"(iv) The deposit funds may be used by the fund if necessary to meet its expenses, in which case the amount so used shall be expended and shall be replenished by insured credit unions in accordance with procedures established by the Board."

SEC. 2804. Section 202(c)(3) of the Federal Credit Union Act (12 U.S.C. 1782(c)(3)) is amended to read as follows:

"(3) When, at the end of a given insurance year, any loans to the fund from the Federal Government and the interest thereon have been repaid and the equity of the fund exceeds the normal operating level, the Board shall effect for that insurance year a pro rata distribution to insured credit unions of an amount sufficient to reduce the equity in the fund to its normal operating level."

SEC. 2805. Section 202(c)(4) of the Federal Credit Union Act (12 U.S.C. 1782(c)(4)) is repealed.

SEC. 2806. (a) Subsections (d) through (f) of section 202 of the Federal Credit Union Act (12 U.S.C. 1782(d) through (f)) are amended—

(1) by inserting "its deposit or" before the words "the premium charge" and "any premium charge" each time they appear, other than in the second sentence of subsection (e) of section 202; and

(2) by striking out "member accounts" and inserting in lieu thereof "insured shares".

(b) Section 202 of the Federal Credit Union Act (12 U.S.C. 1782) is amended—

(1) in the first sentence of subsection (e), by inserting "deposit or" after "the amount of any unpaid";

(2) in the second sentence of subsection (e), by inserting "deposit or" before "premium charge due"; and

(3) in the first sentence of subsection (f), by inserting "deposit or" after "statement or pay any such".

SEC. 2807. Section 202(g) of the Federal Credit Union Act (12 U.S.C. 1782(g)) is amended—

(1) by striking out "statements, and premium charges" and inserting in lieu thereof "statements, and deposit and premium charges";

(2) by striking out "payment of any premium charge" and inserting in lieu thereof "payment of any deposit or adjustment thereof or any premium charge"; and

(3) by striking out "any premium charge for insurance" and inserting in lieu thereof "any deposit or adjustment thereof or any premium charge for insurance".

SEC. 2808. Section 202(h)(1) of the Federal Credit Union Act (12 U.S.C. 1782(h)(1)) is amended by inserting before the semicolon at the end thereof the following: ", unless otherwise prescribed by the Board".

SEC. 2809. Section 202(h)(2) of the Federal Credit Union Act (12 U.S.C. 1782(h)(2)) is amended to read as follows:

"(2) the term 'normal operating level', when applied to the fund, means an amount equal to 1.3 per centum of the aggregate amount of the insured shares in all insured credit unions, or such lower level as the Board may determine; and"

SEC. 2810. Section 202(h)(3) of the Federal Credit Union Act (12 U.S.C. 1782(h)(3)) is amended to read as follows:

"(3) the term 'insured shares' when applied to this section includes share, share draft, share certificate and other similar accounts as determined by the Board, but does not include amounts in excess of the insured account limit set forth in section 207(c)(1)."

SEC. 2811. Section 203(b) of the Federal Credit Union Act (12 U.S.C. 1783(b)) is amended—

(1) by inserting "deposits and" before "premium charges"; and

(2) by adding at the end thereof the following: "The Board shall report annually to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Banking, Finance and Urban Affairs of the House of Representatives with respect to the operating level of the fund. Such report shall also include the results of an independent audit of the fund."

SEC. 2812. Section 206(d)(1) of the Federal Credit Union Act (12 U.S.C. 1786(d)(1)) is amended—

(1) by inserting "(1)" after "subsection (a)";

(2) by inserting "maintain its deposit with and" before "pay premiums to the Board"; and

(3) by adding at the end thereof the following sentence: "Notwithstanding the above, when an insured credit union's insured status is terminated and the credit union subsequently obtains comparable insurance coverage from another source, insurance of its accounts by the fund may cease immediately upon the effective date of such comparable coverage by mutual consent of the credit union and the Board."

SEC. 2813. (a) Title III of the Federal Credit Union Act (12 U.S.C. 1795 et seq.) is amended—

(1) in section 303 by inserting ", an instrumentality of the United States," after "Central Liquidity Facility" in the second sentence; and

(2) by adding at the end thereof the following:

"STATE AND LOCAL TAX EXEMPTION"

"SEC. 312. (a) The Central Liquidity Facility, and its franchise, activities, capital reserves, surplus, and income, shall be exempt from all State and local taxation now or hereafter imposed, other than taxes on real property held by the Facility (to the same extent, according to its value, as other similar property held by other persons is taxed).

"(b)(1) Except as provided in paragraph (2), the notes, bonds, debentures, and other obligations issued on behalf of the Central Liquidity Facility and the income therefrom shall be exempt from all State and local taxation now or hereafter imposed.

"(2) Any obligation described in paragraph (1) shall not be exempt from State or local gift, estate, inheritance, legacy, succession, or other wealth transfer taxes.

"(c) For purposes of this section—

"(1) the term 'State' includes the District of Columbia; and

"(2) taxes imposed by counties or municipalities, or any territory, dependency, or possession of the United States shall be treated as local taxes."

(b)(1) Section 501 of the Internal Revenue Code of 1954 (relating to organizations

exempt from tax) is amended by redesignating subsection (k) as subsection (l) and by adding subsection (j) the following new subsection:

"(k) GOVERNMENT CORPORATIONS EXEMPT UNDER SUBSECTION (c)(1).—The organization described in this subsection is the Central Liquidity Facility established under title III of the Federal Credit Union Act (12 U.S.C. 1795 et seq.)."

(2) Paragraph (1) of section 501(c) of such Code (listing exempt organizations) is amended to read as follows:

"(1) any corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

"(A) is exempt from Federal income taxes under such Act, as amended and supplemented, or

"(B) is described in subsection (k)."

(c) The amendments made by this section shall take effect on October 1, 1979.

ELIMINATION OF PAYROLL DEDUCTION FEES ON FINANCIAL ORGANIZATIONS; ADMINISTRATION OF DISBURSING FUNCTIONS

SEC. 2814. (a) Section 3332(b) of title 31, United States Code, is amended by inserting "without charge" after "shall be sent".

(b) Section 3332 of title 31, United States Code, is amended by striking out subsection (c) and redesignating subsections (d), (e), (f), and (g) as subsections (c), (d), (e), and (f), respectively.

TITLE IX—MISCELLANEOUS PROVISIONS

COST SAVINGS BY ADMINISTRATIVE ACTION

SEC. 2901. (a) It is the sense of the Congress that—

(1) departments, agencies, and instrumentalities of the executive branch of government can continue to make significant management improvements in—

(A) the travel and transportation of personnel and transportation of things for personnel;

(B) the use of consultant services;

(C) public affairs, public relations, and advertising activities;

(D) publishing, printing, reproduction, and audio visual activities;

(E) identification, recovery, and collection of Federal overpayments, delinquencies, and indebtedness; and

(F) the operation, maintenance, management, leasing, acquisition, and disposal of motor vehicles; and

(2) such improvements can result in better use of funds and reductions in expenditures for such activities.

(b) Within six months after the date of enactment of this Act, the Director of the Office of Management and Budget shall prepare and transmit to the Committees on Appropriations and Budget of the Senate and House of Representatives and the Senate Governmental Affairs and House Government Operations Committees a report describing for each of the categories specified in subparagraphs (A) through (F) of subsection (a)(1)—

(1) the baseline cost (or best estimate thereof) for fiscal year 1984;

(2) the savings (below such baseline cost or estimate) that can reasonably be expected to be achieved for fiscal year 1985 by improved management;

(3) an explanation of how such savings will be achieved; and

(4) if necessary, draft legislation to achieve such savings.

(c) If the expected savings described pursuant to subsection (b)(2) are—

(1) less than \$750,000,000 for the category specified in subparagraph (A) of subsection (a)(1),

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(3) In the case of any article from Puerto Rico or the Virgin Islands, only if no subsidy is provided for the production of the article which is of a kind different from (or in an amount per value or volume greater than) subsidies provided to industry generally.

The House bill exempts rum brought into the United States from these possessions from all three requirements. Cane neutral spirits are exempted from requirements (2) and (3), but only if these spirits are not produced under a program having an effect similar to the present redistillation program.

These provisions generally are effective with respect to articles brought into the United States after February 29, 1984. An exception permits payment of tax not in excess of \$130 million with respect to redistilled spirits after June 30, 1983 and before July 1, 1984. An additional exception permits such payments not in excess of \$75 million after June 30, 1984 and before July 1, 1985.

Senate amendment

The Senate amendment permits payment of excise tax revenues derived from articles containing distilled spirits brought into the United States from Puerto Rico or the Virgin Islands only if at least 92 percent of the alcoholic content of the articles is rum.

The Senate amendment generally is effective with respect to articles brought into the United States after February 29, 1984. An exception permits payment of taxes not in excess of \$130 million with respect to articles containing distilled spirits that do not meet the amendment's requirements after June 30, 1983, and before July 1, 1984. The Senate amendment further provides that this exception will terminate if at any time during the phase-out period, Puerto Rico provides (directly or indirectly) a payment to a U.S. distiller of an amount other than direct costs of transportation to and from Puerto Rico.

Conference agreement

The conference agreement follows the Senate amendment with respect to articles containing distilled spirits. Therefore, payments of excise tax with respect to such articles will be permitted only if at least 92 percent of the alcoholic content of the articles is rum.

The conference agreement adopts the restrictions of the House bill with respect to articles other than distilled spirits.

The agreement generally is effective for articles brought into the United States after February 29, 1984. As under the Senate bill, payments of tax not exceeding \$130 million may be made during the period July 1, 1983-June 30, 1984, with respect to redistilled spirits and cane neutral spirits. A modification of the House bill permits such payments not exceeding \$75 million during the period July 1, 1984-December 31, 1984.

The special rule in the Senate amendment regarding incentive payments to U.S. distillers is retained, but with two modifications. First, the rule only applies to articles brought into the U.S. after June 30, 1984. Second, an exception to the rule is provided under which U.S. distillers engaged in redistillation operations may continue to receive so-called "incentive payments" in addition to direct transportation costs during the remaining phase-out period after June 30, 1984. These payments may not, however, exceed \$1.5 million per U.S. distiller. The conferees intend that these payments be limited to payments to the two U.S. distillers (i.e., Glenmore Distilleries and Heublen Spirits Group) which were engaged in redistillation operations before February 29, 1984, and who were entitled to such pay-

ments under contracts binding on that date.¹

Finally, the conference agreement provides that any U.S. distiller who receives incentive payments or other disallowed payments in excess of \$1.5 million between June 30, 1984, and January 1, 1985 is subject to a penalty equal to the total amount of incentive and other payments (other than direct transportation costs) received during the period. This penalty is in lieu of recapture of excise tax payments to Puerto Rico from the date on which the prohibited payments was made. In determining the amount of incentive payments, the conferees intend that the Treasury Department include the amount of price reductions on other products and other indirect payments made by Puerto Rican companies or the Government of Puerto Rico in other transactions between the parties concerned.

2. Limitation on Excise Tax Payments to Puerto Rico and the Virgin Islands With Respect to Distilled Spirits

Present law

The entire amount of excise tax imposed on distilled spirits (i.e., \$10.50 per proof gallon) brought into the United States from Puerto Rico or the Virgin Islands is paid to the possession from which the article comes. Additionally, the entire amount of excise tax imposed on rum imported into the United States from all other countries is paid to those possessions.

House bill

No provision.

Senate amendment

The Senate amendment limits the amount of excise tax that may be paid to Puerto Rico or the Virgin Islands with respect to distilled spirits to a maximum of \$10.50 per proof gallon (i.e., the present rate of tax). Therefore, the \$2.00 per proof gallon increase in the excise tax on distilled spirits provided for by the Senate amendment will not be paid to Puerto Rico or the Virgin Islands with respect to distilled spirits brought into the United States from those possessions.

This provision is effective with respect to distilled spirits brought into the United States after December 31, 1984.

Conference agreement

The conference agreement follows the Senate amendment.

TITLE VII—COMPETITION IN CONTRACTING

The Senate amendment, which is identical to S. 338, the Competition in Contracting Act of 1983, is designed to increase the use of competition in Government contracting and to impose more stringent restrictions on the awarding of noncompetitive—sole-source—contracts. Agencies are required under the Senate amendment to use competitive procedures, whether by inviting sealed bids or requesting competitive proposals, unless a statutory exception allowing the use of noncompetitive procedures is met. S. 338 had been reported unanimously by the Senate Governmental Affairs and Armed Services Committees and passed unanimously by the Senate.

The Senate amendment builds on the two primary procurement statutes—the Armed Services Procurement Act, which governs the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration, and the Federal Property and Administrative Services Act, which generally applies to civil agencies—to establish a uniform framework which distinguishes between competitive and noncom-

petitive procedures. The amendments proposed to both statutes are largely identical.

The conferees adopted a substitute to the Senate amendment which represents a compromise between S. 338 and two House measures—H.R. 5184, the Competition in Contracting Act of 1984, which was ordered reported by the House Government Operations Committee, and H.R. 2545, the Defense Procurement Reform Act of 1983, which is under consideration by the House Armed Services Committee.

The conference substitute retains the major provisions of the Senate amendment, incorporates "full and open" as the required standard for competition, strengthens the justification, approval, and notice requirements to safeguard against unnecessary sole-source contracts, establishes competition advocates to enhance accountability, and strengthens the bid protest process.

While the conference substitute adopts the statutory framework of the Senate amendment, the conferees agree further to amend the Office of Federal Procurement Policy Act and the Budget and Accounting Act. The OFPP Act, a statute which governs all federal agencies, is amended to define certain procurement terms, such as "full and open competition" and "responsible source," to establish notice and reporting requirements, and to create competition advocates in all procuring activities. The Budget and Accounting Act is amended to provide the General Accounting Office with a statutory base for its bid protest function.

MAJOR PROVISIONS

Subtitle A—Amendments to the Federal Property and Administrative Services Act

Section 2711—Procurement Procedures

(1) Competition Requirements

Senate amendment

The Senate amendment establishes "effective" competition as the standard for awarding federal contracts for property or services. In Government contracting, effective competition is a marketplace condition which results when two or more contractors, acting independently of each other and of the Government, submit bids or proposals in an attempt to secure the Government's business.

Conference substitute

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received.

The conference substitute retains the requirement from the Senate amendment that executive agencies shall use competitive procedures—whether by soliciting sealed bids and making award without discussions or by requesting competitive proposals and making award with discussions—when entering into a contract for property or services.

In effect, the substitute, like the Senate amendment, removes the restriction from—and the written justification required for—competitive proposal procedures and places them on par with sealed bid procedures. The substitute maintains minimum criteria for sealed bid procedures to ensure their use when appropriate. The purpose served by substituting the new terms "sealed bid" and "competitive proposal" procedures for

¹For purposes of this restriction, the FTG Corporation is not to be treated as a U.S. distiller.

"formal advertising" and "negotiation" is to eliminate the competitive and noncompetitive connotations associated, respectively, with past terminology.

The substitute defines the term "competitive procedures" to mean procedures under which an executive agency enters into a contract pursuant to full and open competition, thereby permitting all responsible sources to compete. This term also recognizes as competitive the procurement of architectural and engineering services conducted in accordance with title IX of the Federal Property and Administrative Services Act, the competitive selection of basic research proposals, and the General Services Administration (GSA) multiple awards schedule programs.

The selection of architectural and engineering services by the Federal Government is governed by the provisions of 40 U.S.C. 541 *et seq.*, which require the selection to be made on the basis of an evaluation of the design proposals and the qualifications of all offerors. After the selection of the most qualified offeror, the government then negotiates a contract at a fair and reasonable price not to exceed six percent of the estimated cost of the project. If an agency is unable to negotiate such a contract, then the agency is required to negotiate a contract with the next most qualified firm. The principle behind this procedure is to ensure that the government receives quality, up-front design work in its procurement of architectural and engineering services. This is particularly important since such design work has a major impact on the overall cost of the project.

The conferees also recognize the competitive selection of basic research, which is directed toward increasing knowledge of a subject apart from any clear or necessary practical application of that knowledge, to be a competitive procurement procedure. These basic research procurements are unique in that the agency's solicitations are general in nature, identifying areas of research interest, criteria for selecting proposals (including scientific merit), and the method of evaluating proposals. Proposals received are then competitively evaluated through a peer review process before contracts are awarded. By recognizing such procurement of basic research as competitive, the conferees intend to promote the participation of all individuals or companies capable of supporting the government's needs in this important area. Any agency procurement which cannot meet this standard and, in fact, restricts participation, must be justified and approved under the requirements in this substitute for other than competitive procurement procedures.

The substitute also contains a provision that preserves the multiple awards schedule programs administered by the General Services Administration. Although agency implementation of these programs has been criticized in the past, the conferees believe that schedule contracts are a worthwhile method of meeting agency needs for a broad range of commercial products, while imposing a minimum administrative burden on the using agencies. Schedule contracts should be used when GSA can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. The GSA Federal Supply Schedule is an example of this program.

By providing the GSA multiple awards schedule programs with a statutory base, the conferees intend that any responsible vendor wishing to compete for this business is, in fact, allowed and encouraged to compete. As long as the schedule contracts managed by GSA maintain this objective, GSA

is complying with the intent of this substitute and should be supported. The conferees believe, however, that the availability of ADP schedule contracts should not preclude the requirement for agencies to seek lower prices if there are responsible alternative sources available.

The conferees also intend that where competition is conducted among all sources that have been prequalified, in accordance with statute and regulations, and where prequalification is essential to ensure satisfaction of an agency's needs, such procedures shall be considered full and open competitive procedures, provided all responsible sources are given a reasonable opportunity to qualify.

(2) Dual-Sourcing Authority

Senate Amendment

The Senate amendment authorizes executive agencies to establish or maintain an alternative source or sources of supply for a particular property or service by using competitive procedures to allow all sources to compete while excluding the incumbent contractor from competition. Executive agencies are authorized to use this "dual-sourcing" authority only when it would (1) increase or maintain competition and likely result in reduced overall costs, (2) be in the interest of national defense in case of a national emergency or industrial mobilization, or (3) be in the interest of national defense in establishing or maintaining an essential engineering, research, or development capability to be provided by an educational or non-profit institution or a federally funded research and development center.

Conference substitute

The conference substitute substantially incorporates the provisions of the Senate amendment.

(3) Small Business Set-Aside Competition

Senate amendment

The Senate amendment recognizes various existing set-aside programs by authorizing an executive agency to include in its solicitations restrictive provisions which would designate only specified categories of offerors, such as small business concerns, as "authorized by law," for example, the Small Business Act (15 U.S.C. § 631, *et seq.*).

Conference substitute

The conferees seek to give more precise recognition to set-aside programs authorized by statute. For example, Congress has historically provided assistance through the Federal procurement process to small businesses. In recognition of this policy, the conferees include a provision in the conference substitute which authorizes agencies to limit competition to small business concerns or socially and economically disadvantaged small business concerns as long as all such firms within the categories are allowed to compete. The conferees specifically note the Small Business Innovation Research (SBIR) Program, established under P.L. 97-219, as an example of a statutorily authorized small business set-aside program that would be included in this provision.

Further, the set-aside procurements must be made in accordance with the competitive procedures required by the conference substitute and with the statutory requirements of the Small Business Act. Finally, procurements conducted under Section 8(a) of the Small Business Act are exempt from the procurement procedures mandated by the substitute.

(4) Exceptions to Competition Requirement

Senate amendment

The Senate amendment provides six exceptions to competitive procedures which parallel the conditions which the Comptrol-

ler General has historically recognized as legitimate conditions for awarding contracts on a sole-source basis. The Senate amendment shifts the emphasis from having to justify the use of negotiation, which can be either competitive or noncompetitive, to concentrate on those contract which are negotiated noncompetitively, thereby restricting sole-source contracting to when it is truly necessary. The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute and would therefore not be authorized unless permitted by one of these exceptions.

These exceptions are considerably more restrictive than the present exceptions to formal advertising which are used inappropriately, in many cases, to justify going sole source. By using the broad exceptions to formal advertising, such as the "impracticable to obtain competition" exception, as a means to negotiate noncompetitive, agencies have avoided stating the actual justification for awarding a sole-source contract. While sole-source contracting may be necessary in certain situations, tighter control and greater visibility are needed to ensure its proper use.

Conference substitute

The conference substitute retains the restrictions imposed on sole-source contracts provided in the Senate amendment, but requires agencies to obtain competition under the second and sixth exception to the maximum extent practicable. For this reason, the term "noncompetitive procedures" used in the Senate amendment has been changed to "procedures other than competitive procedures" in the conference substitute. Agencies are not precluded from awarding a contract noncompetitively under the second or sixth exceptions (which concern urgent and national security situations) when conditions dictate that only one source is available.

In addition, the conference substitute includes a seventh exception which allows the head of an agency, on a non-delegable basis, to determine when it is necessary in the public interest to use procedures other than competitive procedures for a particular procurement. This waiver is to be exercised, if at all, on a case-by-case basis, rather than for a class of procurements. The head of an agency is required to notify both Houses of Congress in writing of his or her intention to use this exception thirty days before the contract is awarded.

The conference agreement also clarifies that sole-source awards resulting from certain unsolicited proposals or "follow-on" contracts fall under the first exception, which permits a sole-source award when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the agency's needs. In neither case, however, is this exception to be used as a "carte blanche" justification for going sole source.

The use of the first exception for unsolicited proposals and follow-on contracts is limited in both cases to certain specific conditions. In the case of unsolicited proposals, the conference substitute authorizes sole-source awards based on unsolicited research proposals when the agency can determine that the substance of the proposal is not otherwise available to the government, and the proposal does not resemble the substance of a pending competitive procurement.

The conferees do not intend, however, that this provision be used as a loophole by which agencies and contractors can circumvent the competition requirements con-

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tained in the substitute. This authorization is strictly limited to state-of-the-art proposals which represent advanced scientific knowledge. Even under these conditions, agencies should seek proposals wherever possible from competing researchers to ensure that the best proposal available is selected. The substitute, like the Senate amendment, therefore, requires that unsolicited proposals be publicized in the *Commerce Business Daily* unless such publication would result in the disclosure of the originality of thought or innovativeness of the proposed research contained in the proposal.

In the case of follow-on contracts, a sole-source award under the first exception may be made for the continued development or production of a major system or highly specialized equipment if award to other than the original source would result in substantial duplication of cost that could not be recovered through the use of competition, or unacceptable delays in fulfilling the agency's needs.

The conferees intend that follow-on contracts be awarded only to incumbent vendors who receive the original contracts following some form of price or technical competition. The conference substitute recognizes that in major systems and highly specialized equipment acquisitions, there are situations where the initial capital investment could cause substantial duplication of cost if the contract were awarded to other than the original source. However, the substitute requires the agency to determine and document that such cost cannot be offset by savings that would result from openly competing the requirement. The conferees believe that a cost/benefit analysis is necessary to make a precise determination.

The conferees further note that follow-on contracts sometimes result when an agency fails to determine its original requirements accurately. The conferees emphasize that better planning should eliminate this problem and the resultant need for a sole-source contract to the incumbent contractor. The language in the conference substitute should not be construed as legitimizing sole-source contracts that are caused by poor planning.

The conferees also do not intend this provision to be used to perpetuate any contract which involves obsolete or outmoded facilities, systems or processes, including computer systems and software.

(5) Justification and Approval Procedures

Senate amendment

The Senate amendment safeguards against unnecessary sole-source contracting by prohibiting agencies from using noncompetitive procedures unless (1) the use of such procedures has been justified in writing, and (2) the agency has provided advance notice of intent to award a sole-source contract in the *Commerce Business Daily*, inviting bids or proposals from potential competitors, and has considered all bids or proposals received in response to such notice.

Conference substitute

The conference substitute retains the pre-award notification requirements from the Senate amendment which agencies must first meet before a sole-source award can be made.

In retaining the Senate provisions, the conferees emphasize that agencies should, at a minimum, give each bid or proposal received in response to the *Commerce Business Daily* notice sufficient consideration so as to be able to make an informed judgment about the responsibility of the bidder and the responsiveness of the bid.

Agencies are not explicitly required to issue solicitation packages to all contractors who respond to a pre-award notice. This is not to be interpreted to mean that agencies are authorized to deny the distribution of such packages arbitrarily. The purpose of the pre-award notice is to open competition to all offerors who can meet the agency's needs. To serve this purpose, solicitation packages should be available upon request. In situations where competition is not anticipated and solicitation packages have not been prepared, agencies shall provide potential competitors who do respond with solicitation packages or comparable information.

The conference substitute also strengthens the justification procedures in the Senate amendment and establishes new requirements for approvals of sole-source contracts.

The justification statement required for each noncompetitive procurement must be certified as accurate and complete by the contracting officer responsible for awarding the contracts. The justification statement must then be reviewed and approved by either (1) the procuring activity's advocate for competition in the case of contracts over \$100,000; (2) the head of the procuring activity in the case of contracts over \$1,000,000; or (3) the agency's senior procurement executive in the case of contracts over \$10,000,000. Contracting officer certification and review and approval authorities provided by this substitute cannot be delegated, except as specifically authorized under this substitute.

All determinations and decisions required for use of the exceptions to competitive procedures provided in this substitute are to be made on a case-by-case basis. Broad categories or classes of products and services cannot be exempt from competitive procedures.

In the event of an unusual and compelling urgency, the required justification and approvals may be made after the contract has been awarded. Similarly, such justifications and approvals are not required when the head of an agency determines and reports to Congress that it is in the public interest to conduct a noncompetitive procurement, or a procurement is conducted in accordance with the Wagner-O'Day Act (41 U.S.C. § 46 *et seq.*).

The justifications and related documentation are required to be made available to the public. While these disclosures should be made consistent with the provisions of the Freedom of Information Act (5 U.S.C. § 552), the conferees intend that the Act's exemption for internal memoranda not be used to shield these documents from public disclosure. The use of the term "consistent with" is designed merely to ensure that national security, law enforcement, and other sensitive information is not publicly disclosed.

The conference substitute places additional prohibitions and restrictions on the use of procedures other than competitive procedures. Noncompetitive procurements may not be justified on the basis of concerns regarding the future availability of funding. This prohibition is designed to prevent the year-end spending abuses that occur when agencies are faced with large amounts of unexpended appropriations at the end of the fiscal year. Under this situation, agencies rush to sign a contract with a vendor on a sole-source basis in order to avoid having to turn money back to the Treasury. The conferees find this practice to be unconscionable. Similarly, the substitute prohibits the use of the lack of advance planning as a justification for using noncompetitive practices. The conferees reject the assertions made by some agency procurement officials

that this is a legitimate reason to curtail competition. A contrary conclusion would legitimize unacceptable management practices.

The substitute also prohibits an agency from procuring its goods and services from another agency unless that agency has complied with the requirements of the substitute. The substitute includes this prohibition to prevent one agency from acquiring its goods and services from another agency's sole-source contract without having to justify a noncompetitive procurement itself. This restriction is in addition to, not in lieu of, any other restriction provided by law, including the Economy Act of 1932 (31 U.S.C. § 686(a)).

(6) Small Purchase Procedures

Senate amendment

The Senate amendment recognizes that the competitive procedures required of large purchases may not be appropriate for small purchases. The Senate amendment therefore provides a basis in statute for regulations to establish separate small purchase procedures, allowing agencies to scale down their efforts as long as they obtain reasonable competition.

Conference substitute

The small purchase provisions of the Senate amendment are retained under the conference substitute in a separate subsection. Within this new subsection, agencies are required to promote competition to the maximum extent practicable when using small purchase procedures. The regulations issued pursuant to this subsection are to be incorporated into the government-wide Federal Acquisition Regulation consistent with current statute.

(7) Planning and Solicitation Procedures

Senate amendment

The Senate amendment requires agencies, as part of the affirmative effort to obtain competition, to use advance procurement planning, conduct market research, and develop nonrestrictive specifications.

Conference substitute

The conference substitute retains these requirements contained in the Senate amendment, but applies them as planning requirements for all procurements—competitive and noncompetitive.

The substitute also retains the broad guidelines set forth in the solicitation section of the Senate amendment for agencies to follow in defining their needs in order to maximize, rather than limit, competition. The substitute authorizes agencies to specify their needs in either functional, performance, or detailed design terms, whichever will ensure timely performance and will promote the use of full and open competition.

Wherever practical, the conferees strongly believe that contractors should be told what the Government needs in functional terms. This approach allows the Government to take advantage of the innovative ideas of the private sector.

(8) Evaluation and Award Procedures

Senate amendment

The evaluation and award procedures for sealed bids and competitive proposals set forth in the Senate amendment are largely the same as those currently required in the Armed Services Procurement Act and the Federal Property and Administrative Services Act for formal advertising and negotiation. The amendment clarifies that agencies shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation.

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Conference substitute

The conference substitute retains the evaluation and award procedures under the Senate amendment, and modifies the language to reflect the requirement for full and open competition.

*Section 2713—Truth in Negotiations**Senate amendment*

The Senate amendment extends the statutory requirement in the Armed Services Procurement Act for submitting certified cost or pricing data to cover civilian procurements under the Federal Property and Administrative Services Act, and establishes a uniform threshold in both statutes at \$100,000.

Contractors are presently required by statute to submit cost or pricing data and certify that the data are "accurate, complete, and current" prior to the award of any negotiated defense contract over \$500,000 and are required by regulation to submit such data for any negotiated civilian contract over \$100,000. The purpose of this "truth-in-negotiations" provision is to provide the basis for retroactive price adjustment in the event that data submitted prior to the award of a contract were not accurate, complete, and current, without resorting to costly and time-consuming litigation. Without certification, agencies lack the legal ammunition to deter defective pricing.

Conference substitute

The conference substitute retains the Senate provisions and, in addition, authorizes contracting officers to request cost or pricing data for defense and civilian procurements under \$100,000. Obtaining such data for small dollar contracts has proven to be a problem in purchasing spare parts where excessive over-charges have become legendary.

*Section 2713—Automated Data Processing Dispute Resolution**Senate amendment*

The Senate amendment contains no provision on automated data processing dispute resolution.

Conference substitute

The conference substitute amends Section 111 of the Federal Property and Administrative Services Act of 1949 to provide an alternate forum for resolving contractual disputes involving procurements of automated data processing (ADP) equipment and services conducted under Public Law 89-306 (the Brooks Act). This provision applies only to those automated data processing procurements conducted under the Brooks Act, and it does not apply to those ADP procurements exempted under the 1982 Department of Defense Authorization Act. ADP procurements conducted by DOD are exempt from the Brooks Act only if the equipment and services are primarily for functions involving intelligence, cryptology, command and control, weapon systems, or similar type systems. Protests over ADP procurements in those areas not covered by the Brooks Act will continue to be heard by the GAO or the courts, as under current practice.

The Brooks Act, enacted in 1965, provides the General Services Administration (GSA) with the sole authority to procure ADP equipment and services for federal agencies either by conducting the procurement on behalf of the agency, or by granting a delegation of procurement authority to the agency to conduct its own procurements. The Brooks Act has opened the federal marketplace to all responsible computer companies. However, due to the increasing number of computer procurements conducted every year, coupled with the complexity of the

technology, the current informal process of resolving conflicts between the buying agency and the suppliers has become cumbersome and prolonged. Further, charges have been made by both the agencies and the contractors that GSA's current process does not provide an objective forum for dispute resolution. The conferees believe that it has become increasingly apparent that a new forum is needed to provide a fair, equitable and timely remedy in this area.

The conference substitute provides that remedy by authorizing the GSA Board of Contract Appeals to consider protest cases involving ADP procurements conducted under P.L. 89-306. The Board is well suited to hear protests of this nature. First, the Board can use already established procedures to hold hearings, compel production of documents, obtain testimony of witnesses, and conduct cross-examination under oath. Second, the Board can use the authority which GSA currently has under the Brooks Act to revoke, suspend or modify a delegation of procurement authority. Further, the Board is authorized to suspend any contract which was awarded pursuant to P.L. 89-306.

The conference substitute requires that an initial hearing be held by the Board within ten days of the filed protest, and that the Board then issue its final decision within 45 working days from the date of the protest unless its chairman determines that specific and unique circumstances require a longer period for consideration. Based upon the results of the initial hearing, the Board can suspend the delegation of procurement authority while the protest is pending. The suspension of a solicitation or contract performance shall not be ordered if the agency establishes that urgent and compelling circumstances exist. In addition, the conference substitute authorizes the Board to award the costs of pursuing a protest if such protest action is sustained by the Board.

The conferees recognize that these provisions provide a unique and innovative method of handling protests of a highly technical and complex nature. The conferees believe that the Board is well equipped to provide timely resolution of conflicts between the procuring agencies and the suppliers of computer products and services. To avoid disrupting legitimate procurements, and especially to prevent protest actions taken in bad faith from interrupting contract performance, the Board is authorized to dismiss at any point in the process any protest action that it determines to be frivolous or which, on its face, does not state a valid basis for the protest.

The conference substitute establishes a three-year sunset provision which should allow Congress to make a full and objective evaluation of the Board's operations in resolving ADP contractual disputes prior to the consideration of reauthorization.

*Subtitle B—Amendments to the Armed Services Procurement Act**Section 2721—Defense Procurement Policy**Senate amendment*

The Senate amendment contains no provisions directly amending the existing policy section in the Armed Services Procurement Act.

Conference substitute

The conference substitute amends the existing policy section in the Armed Services Procurement Act to set forth broad defense procurement policy which, first and foremost, directs the Department of Defense, the military services, the Coast Guard, and the National Aeronautics and Space Administration to use full and open competitive procedures in acquiring property and serv-

ices. The other policy statements included in the conference substitute are intended to conform with the policies set out in section 2 of the Office of Federal Procurement Policy Act.

*Sections 2722 and 2723**Senate amendment and conference substitute*

The remaining sections under Subtitle B of the conference substitute parallel sections 2711 and 2712 of Subtitle A and the explanations of the provisions are the same and the conferees' intentions with respect to these provisions are the same.

*Subtitle C—Amendments to the Office of Federal Procurement Policy Act**Section 2724—Definitions**Senate amendment*

The Senate amendment did not amend the OFPP Act.

Conference substitute

The conference substitute defines the terms "full and open competition" to mean that all responsible sources are permitted to submit sealed bids or competitive proposals; "competitive procedures" to mean the procedures under which an agency enters into a contract pursuant to full and open competition; and "responsible source" to mean a prospective contractor who is capable of satisfying the agency's needs, considering resources, delivery or performance schedule, performance record, integrity and business ethics, organization and experience, equipment and facilities, and any other qualifications. These terms are used throughout the conference substitute.

*Section 2732—Procurement Notice and Records; Advocate for Competition**(1) Procurement Notice Requirements**Senate amendment*

The Senate amendment establishes notice provisions in the Armed Services Procurement Act and the Federal Property and Administrative Services Act which require a notice to be published in the Commerce Business Daily for (1) prospective competitive and noncompetitive contracts over \$10,000, and (2) contract awards over \$10,000 for those contracts which are likely to result in the award of subcontracts. The burden is placed on the procuring agency, under this provision, to furnish the information for publication to the Secretary of Commerce, who is responsible for publishing the notice promptly in the Commerce Business Daily.

The Senate amendment establishes time periods for publication, specifies the information which a proper notice should include, and provides exceptions to the notice requirement which are separate but identical in almost all cases to the exceptions for noncompetitive procedures.

Conference substitute

The conference substitute retains, with minor modifications, the notice requirements set forth in the Senate amendment, but consolidates the dual-conforming amendments to the defense and civilian procurement statutes by placing a uniform notice requirement in the Office of Federal Procurement Policy Act.

*(2) Record Requirements**Senate amendment*

The Senate amendment facilitates congressional oversight of contracting activities by requiring agencies to establish and maintain a record, by fiscal year, of the procurements (other than small purchases) in which noncompetitive procedures are used. The information to be included in the

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record, which would be transmitted on a quarterly basis to the Federal Procurement Data System, designates the contractor who received the award, the property or services which were obtained, the dollar value, the reason for using noncompetitive procedures, and the positions of the individuals in the procuring agency who required and approved the sole-source award.

Conference substitute

The conference substitute retains the record requirements of the Senate amendment, again consolidating the amendments to the defense and civilian procurement statutes into a uniform provision in the OFPP Act, but expands application of this provision to include all procurements—competitive and noncompetitive—in a computerized file. This file should be indexed in a manner to provide ready access to such information by other agencies, Congress, and the public.

(3) Advocate for Competition

Senate amendment

The Senate amendment establishes in each executive agency the position of advocate for competition with responsibilities for promoting competition in the agency's procurement process. The agency competition advocate is designed to be at a sufficiently high level to directly influence the procurement policies and procedures within the agency, while not being directly responsible for the individual procurements. The head of each agency is prohibited from assigning duties to the competition advocate which are inconsistent with the advocate's responsibility to promote competition. As such, the position of competition advocate should not be assigned to any individual who is responsible for the initiation or conduct of any specific agency procurement.

Conference substitute

The conferees recognize the importance of the position of competition advocate and the need to ensure that key Federal officials at all levels are made aware of the benefits of competition and become firmly committed to its use. To further these goals, the conference substitute expands the agency advocate's responsibilities and requires the establishment of an additional advocate for competition in each procuring activity.

The substitute requires the competition advocates to challenge barriers to, and promote full and open competition in, the procurement of property and services. Under the review and approval procedures established by the conference substitute, the procuring activities' competition advocates are responsible for approving all noncompetitive contract awards which involve expenditures exceeding \$100,000 but less than \$1,000,000. Further, the agency advocate is given the additional responsibilities of recommending to the agency's senior procurement executive (1) goals and plans for increasing competition on a fiscal-year basis, and (2) a system of personal and organizational accountability designed to encourage the procurement workforce to emphasize competition.

The conferees recommend that the performance ratings of procurement personnel include an appraisal of their efforts to promote competition in agency procurements.

(4) Annual Report on Competition

Senate amendment

The Senate amendment requires the head of each executive agency to issue an annual report to Congress on the agency's use of competition in contracting. Specifically, the report should provide an overview of the actions taken by the agency to increase competitive contracting and reduce the number

and dollar value of noncompetitive contracts, and the activities and accomplishments of the agency's advocate for competition.

Conference substitute

The conference substitute incorporates the annual report requirement from the Senate amendment and establishes January 31 as the deadline for submission to Congress for fiscal years 1986 through 1990.

(5) Competition Requirement

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute amends Section 16(1) of the OFPP Act (executive agency responsibilities) to require the use of full and open competition in executive agency procurements of property and services. Language contained in this substitute requires agencies, when using competitive procedures, to establish policies, procedures, and practices necessary to ensure that a sufficient number of sealed bids or competitive proposals are received from responsible sources to fulfill the government's requirements (including performance and delivery schedules) at the lowest reasonable cost considering the nature of the property or services procured. This requirement applies to all agency procurements, including those made under set-aside programs.

Subtitle D—Amendments to the Budget and Accounting Act

Section 2751—Procurement Protest System

Senate amendment

The Senate amendment contains no provisions regarding the General Accounting Office bid protest system.

Conference substitute

The conferees believe that a strong enforcement mechanism is necessary to insure that the mandate for competition is enforced and that vendors wrongly excluded from competing for government contracts receive equitable relief. To accomplish this, the conference substitute adds a new subchapter to Chapter 35 of Title 31, United States Code, which codifies and strengthens the bid protest function currently in operation at the General Accounting Office (GAO). The provisions of this section become effective on January 15, 1985.

The conference substitute establishes an enforcement mechanism keyed to the procedures contained in the Senate amendment for solicitation, notice, evaluation, and award. The procurement protest system further relies on record requirements in the Senate amendment, as expanded in the conference substitute, to insure the availability of information needed not only by the Comptroller General to make determinations in procurement protests, but also by interested parties to identify, and initiate action against, solicitations and awards which they believe are unlawful.

The Comptroller General is not given exclusive authority to hear protests. The conferees do not intend, for example, that the GAO decide matters dealing with the Small Business Administration's responsibilities under the Small Business Act to establish industry size standards or to issue Certificates of Competency to small businesses. Finally, interested parties with recourse to the General Services Administration Board of Contract Appeals in disputed computer procurements may not protest the same action to both the GAO and the GSA board.

Any actual or prospective bidder of offeror whose direct economic interest would be affected by the award of or failure to

award a procurement contract by an executive agency may challenge the agency's solicitation, award or proposed award by filing a protest with the Comptroller General. Final agency determinations under section 307 of the Federal Property and Administrative Services Act and section 2310 of title 10, United States Code, may be the subjects of protests to GAO, the courts, and where appropriate, the GSA board.

Once a protest has been filed with GAO, the Comptroller General shall notify the executive agency involved within one day of receipt of the protest. The executive agency then has 25 working days (10 if the Comptroller General selects the "express option") to respond. The Comptroller General must issue his opinion within 90 working days (45 calendar days under the express option). The Comptroller General may extend the deadlines when appropriate for specific protests, on a case-by-case basis; the conferees regard such extensions as exceptional, however, and to be used in unique circumstances only.

If, when a protest is filed, the contract in question has not yet been awarded, an award may not be made unless the head of procuring activity responsible finds and reports to the Comptroller General that urgent and compelling circumstances which significantly affect the interests of the United States will not permit awaiting the Comptroller General decision. (This finding may be made only if the award is likely to occur within 30 calendar days.) If a protest is filed within 10 days after award of the contract, performance shall cease and all related activities which may result in additional obligations being incurred by the United States must be suspended, unless the head of the procuring activity informs the Comptroller General that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the Comptroller General's decision, or that performance of the contract is in the best interest of the United States.

Before notifying the Comptroller General that continued performance of a disputed contract is in the government's best interest, however, the head of the procuring activity should consider potential costs to the government from carrying out relief measures as may be recommended by the Comptroller General if the protest is subsequently sustained. This is to insure that if the Comptroller General sustains a protest, such forms of relief as termination, recompetition, or re-award of the contract will be fully considered for recommendation. Agencies in the past have resisted such recommendations on the grounds that the government's best interest would not be served by relief measures of this sort because of the added expenses involved. This provision is designed to preclude that argument in the future, and thus to avoid prejudicing those relief measures in the Comptroller General's review.

If the Comptroller General determines that a protested procurement action has involved government non-compliance with statutes or regulations, the Comptroller General is required to recommend corrective action to the executive agency responsible, and the head of the procuring activity involved must notify the Comptroller General if the agency has not implemented the recommendations within 60 calendar days. This provision does not preclude the Comptroller General from requesting the agencies to notify the GAO of the status of any other recommendation. An annual report of all notifications received by the Comptroller General, describing each instance of non-im-

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plementation, must be submitted to Congress.

The Comptroller General may grant to a successful protesting party reimbursement for expenses of preparing bids or proposals related to the disputed contracting action and for costs incurred in making the protest. These costs shall be paid from the procurement funds (not necessarily funds for the specified procurement which was challenged) of the executive agency involved.

The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a valid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit. Finally, the conferees expect that the Comptroller General will declare monetary awards only in cases where the agencies have unfairly excluded vendors from procurements, and not in cases involving minor technicalities.

The Comptroller General currently receives from courts and agencies requests concerning the propriety of procurements. The conferees intend that the Comptroller General have the discretion to continue to process these requests in a manner consistent with the one used for bid protests.

The conference substitute also includes a section regarding alternative remedies. The subchapter regarding bid protests does not alter the current rights of any person to seek administrative or judicial review of any alleged violation of a procurement statute or regulation. Further, documents related to a Comptroller General's decision on a procurement and the agency's response to such decision must be made a part of the agency record and be made available to the courts in the event a suit is filed against the agency involving the procurement.

Subtitle E—Effective Date; Regulations; Study

Section 2751—Effective Date

Senate amendment

The Senate amendment applies to any solicitations for bids or proposals issued on or after the date 270 days after enactment.

Conference substitute

The conference substitute establishes April 1, 1985, which is approximately 270 days from the anticipated date of enactment, as the effective date. The substitute also establishes January 15, 1985, which allows approximately 180 days for implementation, as the effective date for the bid protest provision.

Section 2752—Modification of the Federal Acquisition Regulation

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute requires that the Federal Acquisition Regulation (FAR) shall be modified by March 31, 1985, to conform to the requirements set forth in this substitute. Modification shall also be made to the FAR within this time period to reflect policy directives issued by the Office of Federal Procurement Policy.

The conferees note with considerable concern that the system established to maintain the FAR is not working. Presently, FAR maintenance is jointly vested in two procurement regulatory councils, the Defense Acquisition Regulatory (DAR) Council, established by the Secretary of Defense, and the Civilian Agency Acquisition Council (CAAC), established pursuant to the FAR.

Under the maintenance procedures prescribed by the FAR, both councils must consider and approve each proposed modification or addition to the FAR.

Given this cumbersome maintenance system, the conferees note that, to date, the regulatory councils have failed to implement both statutory changes and OFPP policy directives. Given the currently limited role accorded to OFPP in the FAR maintenance system, the conferees are concerned that the continuing lack of leadership for the FAR maintenance system will perpetuate the untimely implementation of FAR changes required by statute or OFPP policy directives.

By statute, the OFPP Administrator is empowered to issue procurement regulations, procedures or forms when the two regulatory councils are unable to agree or fail to take action. In the event that conflict or inaction precludes the two councils from meeting the April 1, 1985, deadline for implementing the modifications to the FAR pursuant to this substitute, the OFPP Administrator must intervene to issue the regulations by this deadline. Further, the conferees believe that the OFPP Administrator should be accorded a greater role in managing the FAR maintenance process on a continuing basis.

Section 2753—Study

Senate amendment

The Senate amendment has no comparable provision.

Conference substitute

The conference substitute requires the Office of Federal Procurement Policy to recommend to Congress a plan for increasing the use of full and open competition in the procurement of professional, technical and managerial services. This category of procurements often involves the use of evaluation criteria, other than price, in the selection of the winning vendor.

The Office of Federal Procurement Policy is directed to recommend competitive selection procedures for procurements where price is not a significant factor and the agency has determined a legitimate need for the best or highest quality proposal. Such a plan should include requirements for the agencies to follow to ensure that all responsible vendors are allowed to compete for the above procurements and that fair and reasonable prices are paid for the service. OFPP should consider, as a possible alternative prior to designing a plan, a system in which all qualified persons capable of providing specified services are placed on a list maintained by the government, in which each of those persons is encouraged to submit a competitive proposal in response to each solicitation for such services, and in which the award is made to the bidder on the list who can perform the service for the lowest overall cost.

The Office of Federal Procurement Policy should also, in conducting the study, consult with experts in such fields as soil engineering, real estate appraising, surveying and mapping, and other professional services which do not fit within the traditional concept of Federal procurement procedures.

TITLE VIII—FEDERAL CREDIT UNION ACT AMENDMENTS

Recapitalization of the National Credit Union Administration

Share Insurance Fund (Sections 2801-2812)

Sections 2801-2812 authorizes the National Credit Union Administration (NCUA) to impose a capital assessment on insured credit unions equal to 1 percent of their insured share accounts, thereby raising the capital of the fund to 1 1/2 percent.

The recapitalization of NCUA's insurance fund restructures one of the three federal deposit insurance funds in a significant manner. The conferees agree that there is a need for thorough Congressional review of deposit insurance generally, of the deposit insurance reports submitted by the federal insuring agencies pursuant to the Garn-St Germain Act and of deposit insurance reform proposals urged by various deposit insurance experts and the federal insuring agencies. However, in view of the Senate's position on sections 2801-2812 and the need to expedite completion of the Omnibus Reduction Act Conference, the House receded to the Senate.

Tax Exemption of the NCUA

Central Liquidity Facility (Section 2813)

Established in 1978 by Public Law 95-630, the Financial Institutions and Interest Rate Control Act, the CLF is the "central bank" for credit unions. The CLF is a mixed ownership corporation (stock owned by credit unions), is on-budget, and is located within and managed by the NCUA. Section 2813 corrects an oversight in the enactment of P.L. 95-630 which provided that the CLF be similar to Federal Reserve Banks and Federal Home Loan Banks but did not explicitly exempt the CLF from taxation. Section 2813 corrects this oversight and explicitly exempts the CLF from taxation. The effective date of this provision would be retroactive to October 1, 1979. Therefore, the House receded to the Senate.

Elimination of Treasury Fees on Payroll Allotment (Section 2814)

Section 2814 eliminates the fee which Treasury charges financial institutions for depositing payroll allotments of civilian federal employees. The House passed a similar bill in 1982; and a similar bill, H.R. 3879, was approved by the House under suspension on April 2, 1984. The House receded to the Senate.

Title IX—Miscellaneous Provisions

Section 2901. Cost Savings by Administrative Action

House amendment

The House amendment contains no provision relating to reduction of obligations for various types of administrative activities.

Senate amendment

Section 1603 of the Senate amendment requires that the total amount which may be obligated for various administrative purposes in FY 1985 be reduced by specified amounts below the total appropriated for such purposes for FY 1984. These purposes and amounts are:

Section 1603(a)—Certain Travel and Transportation.....	\$750 million.
Section 1603(b)—Consultant Services.....	\$1 billion.
Section 1603(c)—Public Affairs, Public Relations, Public Information and Advertising.....	\$100 million.
Section 1603(d)—Publishing, Printing, Reproduction, and Audiovisual Activities.....	\$250 million.
Section 1603(f)—Certain Motor Vehicle Operations.....	\$160 million.

Section 1603(e) requires OMB to "effect savings of \$2,100,000,000 through enhanced identification and recovery and collection of Federal overpayments, delinquencies, and indebtedness . . . most recently considered to be uncollectible." This is the amount that the President's FY 1985 budget estimated